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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 CFR 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, licensed as "an Adult Family Home for the care and supervision of adults," seeks to employ the beneficiary as a registered nurse. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as a member of the professions holding an advanced degree.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The beneficiary holds a Bachelor of Science in Nursing from Cebu Doctor's College in the Philippines. The petitioner's initial submission consisted entirely of documents relating to the petitioning facility and the beneficiary's credentials as a nurse.

The regulation at 8 CFR 204.5(k)(2) states, in pertinent part:

> *Advanced degree* means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Registered nursing is not among the occupations listed in section 101(a)(32) of the Act. Therefore, for the purposes of the immigrant classification sought in this proceeding, registered nursing is a profession only if a U.S. baccalaureate or its foreign equivalent is the minimum requirement for entry into the occupation. The Department of Labor's *Occupational Outlook Handbook*, ("*Handbook*"), 2002-2003 edition, page 269, states:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000 were at the A.D.N. level. B.S.N. programs, offered by colleges and universities, take 4 or 5 years. More than one-third of all programs in 2000 offered degrees at the bachelor's level. Diploma programs, administered in hospitals, last 2 to 3 years. Only a small number of programs offer diploma-level degrees. Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

The *Handbook* indicates that career opportunities are generally broader for nurses who hold B.S.N. degrees, but entry-level careers in registered nursing are plainly available to individuals without bachelor's degrees.

The director denied the petition, stating that the petitioner had not claimed that the beneficiary is an alien of exceptional ability, and the record does not establish that the beneficiary is a member of the professions or that the position offered by the petitioner requires a member of the professions holding an advanced degree.

On appeal, the petitioner submits excerpts from Washington state regulations pertaining to Adult Family Home Minimum Licensing Requirements and Nurse Delegation Law and Protocols. These regulations demonstrate the petitioner's need to have a registered nurse on staff, but again these materials do not address the stated grounds for denial. The issue in contention is not whether the petitioner needs to employ a nurse. Rather, the petitioner sought to classify the beneficiary as a member of the professions holding an advanced degree, and by regulation the beneficiary cannot qualify for this classification unless her occupation constitutes a profession. Because an associate degree is sufficient for entry into the occupation, the occupation does not require a baccalaureate and therefore the occupation does not meet the regulatory definition of a profession.

Another issue, not mentioned by the director, is apparent from review of the record. As noted above, section 203(b)(2)(A) of the act requires that an alien's services must be sought by a U.S. employer. This job offer requirement includes the requirement of an approved labor certification from the U.S. Department of Labor. The record contains no labor certification. Section 203(b)(2)(B) of the Act establishes a waiver of the job offer requirement "when the Attorney General deems it to be in the national interest."

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner did not submit an approved labor certification with the petition, and therefore, if only by default, we consider the petitioner to have applied for a national interest waiver. The petitioner, however, has offered no explanation as to why it would be in the national interest to waive the job offer/labor certification requirement in this proceeding.

On appeal, the petitioner refers to a "nationwide shortage of registered nurses" and to "the need of petitioner for the services of the beneficiary." However legitimate these concerns are, they do not address the director's finding that registered nursing does not meet the regulatory definition of a profession. In a shortage situation, the petitioner can obtain a labor certification from the U.S. Department of Labor. Pursuant to *Matter of New York State Dept. of Transportation, supra*, a worker shortage is not sufficient grounds for a waiver of the job offer requirement. A limited exception to this policy applies to certain physicians (see section 203(b)(2)(B)(ii) of the Act) but is not applicable in this instance.

Furthermore, the petitioning facility is licensed for a maximum of four adult residents, and the hiring of a registered nurse to care for four individuals will have a negligible effect at the national level. The very fact that the petitioner is a nurse is not sufficient grounds for a waiver, because even if registered nursing were recognized as a profession, the statute provides no blanket waiver

for registered nurses, nor does the statute imply that blanket waivers are available to members of any profession except for certain physicians.

The petitioner has not claimed that the beneficiary is an alien of exceptional ability, nor do the minimal documents in the record suggest as much. The petitioner has not overcome the director's finding that registered nurses are not members of the professions. The petitioner has never directly addressed the issue of the national interest waiver. On the basis of the evidence submitted, the petitioner has not established that the beneficiary qualifies for the classification sought, or that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer, seeking a more appropriate classification, accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.